

In the Matter of :
:
Use of Portions of Returned 2GHz Mobile : IB Docket No. 05-221
Satellite Service Frequencies :
:

To: The Federal Communications Commission
International Bureau

SUMMARY

As to the remaining 8 MHz of spectrum located in the 2 GHz MSS band, the Commission sought public comment on how and where it should be distributed. The Commission has proposed, in the alternative, 1) that the remaining 8 MHz be granted to TMI and ICO “pursuant to a procedure consistent with Section 316 of the Communications Act”, or 2) that the spectrum be offered to possible “new MSS licensees”, and finally, 3) that the spectrum be made available for reallocation to another service.

² FCC 05-133, released June 29, 2005, IB Docket 05-220. The public comment period on this initial Notice was limited to fourteen (14) days.

We urge the Commission to make the spectrum available to other services that provide current, cognizable benefit to the public. This distribution of a public asset must be accomplished through the Rule Making process and not through a Public Notice procedure where the responsibilities of the Commission and the rights of those impacted are artificially limited. We ask the Commission to carefully consider the substantial existing inherent public benefit provided by competing potential licensees. This spectrum is desperately necessary to assure the adequate provision of Electronic News Gathering (ENG) operations into the coming decades. We believe that upon due consideration and where utilizing appropriate criteria that the Commission will agree that the returned spectrum should be assigned to the use of the Broadcast Auxiliary Service as no other class of licensee supplies the immediate, clear public value and benefit as do licensees providing these services.

COMMENTATOR

Total RF Marketing, Inc. (Total RF) is a supplier of wireless broadcast infrastructure and communications facilities to the broadcast industry, other commercial enterprises as well as local, state and federal governments. We have had the opportunity to provide our services and equipment to the broadcasters of such events as the Olympics (all of the Games since Barcelona in 1992), every major professional golf event (PGA and LPGA) and virtually every other major form of sporting event in the United States and internationally. We were instrumental in reestablishing communications for the major networks subsequent to the terrorist attacks of September 11, 2001.

Total RF holds numerous FCC licenses within the Broadcast Auxiliary Band, the Industrial Band as well as in the Local TV Band. We supply the engineering, equipment and personnel required to produce on-site, real time broadcasts of exemplary quality. The technologies provided by Total RF and the broadcast auxiliary services are the “first step” in virtually all “on location” electronic newsgathering operations.

DISCUSSION

The “remaining spectrum” should not be gifted to TMI and ICO.

The Commission has stated in its *Public Notice* that its first option in addressing the distribution of the spectrum surrendered by the failed satellite ventures (after acting to donate two thirds of that spectrum to ICO and TMI by virtue of its immediate prior

*Public Notice*³) is to give these entities yet another portion of this extraordinarily valuable asset. This would result in two of the original eight licensees⁴ holding the *entire* 40 MHz of MSS spectrum currently available to the service. This alternative is contrary to reason as well as to the most fundamental goal of the Commission – that it administers this public asset in a manner that best serves and provides an actual, identifiable benefit to the public.

When Congress passed the Radio Act of 1927 and created the precursor to the Federal Communications Commission, the Federal Radio Commission, it empowered that Commission to issue licenses where the "public interest, necessity or convenience would be served".⁵ In 1934 the Communications Act was passed with an objective to "make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."⁶ The Communications Act recognizes that the "ownership" of the airwaves is a public asset – not a private one. In fact, as to the individual "user" of spectrum the Act states that only a temporary, clearly defined and delimited permission (license) to utilize that asset may be given to any person.⁷ The Communications Act and its predecessors, at their most basic, require the Commission to govern the use of radio spectrum in a manner that recognizes, protects and advances the public welfare inherent in that use.

What public benefits have the MSS licensees provided and what benefit is to be reasonably expected given their experience to date? Neither ICO nor TMI has come close to meeting their individual business and operational goals – let alone provide any cognizable benefit to the public for their harboring of this public asset. Both companies are years behind in the forecasted development and deployment of their proposed systems. Both have been compelled to substantively modify their business plans and each has been forced to come before the Commission seeking waivers and extensions in

³ FCC 05-133, released June 29, 2005, IB Docket 05-220

⁴ *The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Report and Order, 15 FCC Rcd 16127 (2000).

⁵ *Electronic Media Law & Regulation*, 3rd Ed., Creech, K., Focal Press 2000, chapter 3, page 51, "The Rationale of Broadcast Regulation" generally.

⁶ Communications Act of 1934, 47 U.S.C. § 151 (1988)

⁷ 48 U.S.C. § 301

order to protect their initial grant of spectrum.⁸ The simple fact that all of the other original MSS licensees have chosen (or been forced) to abandon their business plans and have now surrendered the spectrum originally assigned them clearly illustrates the current fiscal reality in which this service exists.

The remaining MSS licensees do not need the additional spectrum as both TMI and ICO originally opined to the Commission that they would be functionally, technically and financially able to build out their systems and initiate business operations with their current grant of spectrum. In fact, the Commission itself has concluded that MSS service could be provided with as little as 2.5 MHz of spectrum each for transmission and reception.⁹ There is no reason whatsoever, except perhaps the ubiquitous human belief that “more is always better than less”, for a grant of additional spectrum.

While the promise and vision of MSS is certainly enticing, the operational and commercial reality make obvious that, at best, viable MSS services are years away (if ever) from providing any substantive public benefit. Therefore, in judging whether to continue to give an extraordinarily valuable public asset to these entities the Commission must initially determine whether the opportunity of benefit to the public by this service is real – or simply an attractive mirage.

If there is substance to the promise of MSS then certainly ICO and TMI ought to be able to deliver on that promise within the spectrum that they were originally granted let alone with the additional spectrum inherited from their failed peers by virtue of the Commission’s grant of spectrum contained in its first *Public Notice*¹⁰.

In its second *Public Notice*, the Commission advances a belief that Section 316 of the Communications¹¹ Act permits it (in fact permits the International Bureau of the Commission) to “modify” the authorization of an existing licensee by granting to it additional spectrum. However, Section 316 simply grants the Commission the authority to modify a license where to do so “will promote the public interest, convenience, and necessity, or the provisions of this chapter”. Absent from the *Public Notice* is any indication as to what benefit, public interest, convenience or necessity would be served

⁸ See: *Comments of Inmarsat Ventures Limited*, IB Docket No. 05-220, pages 17 and 18.

⁹ *The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Report and Order, 15 FCC Rcd 16127 (2000), paragraph 17

¹⁰ FCC 05-133, released June 29, 2005, IB Docket 05-220

by proceeding with the proffered gift of additional spectrum. In fact, as the Section further requires the Commission to provide its “grounds and reasons”¹² for the intended action, any modification by the Commission based solely upon the *Public Notice* would be statutorily deficient.

Should the returned Spectrum be made available to “new” Mobile Satellite Service Licensees?

A review of the history of mobile satellite service licensees cannot create any amount of optimism regarding the immediate future growth of the service. On the contrary, where six (6) of the original eight (8) (75%) MSS licensees have abandoned their operations - a marked degree of business pessimism is to be reasonably expected.

In its current Strategic Plan¹³ the Commission indicates its intent to “encourage the highest and best use of spectrum” by “developing and utilizing a market oriented allocation and assignment” policy. The question then is whether assignment of this spectrum to either the remaining MSS licensees (who have been unable to meet their development and deployment milestones) or to any other MSS operation – who will be faced with exactly the same financial and market obstacles and therefore have as much chance of successful deployment as ICO and TMI – is the “highest and best use”.

Simply put, the “highest and best use” of spectrum is that use which provides the most benefit to the greatest number of people. The MSS systems are years away (if ever) from being able to provide any substantive public benefit. On the other hand there are services that are providing immediate, cognizable service to the public and for whom additional (and in the case of the Broadcast Auxiliary Service, replacement) spectrum is desperately necessary. The Commission should therefore refrain from granting the returned spectrum to “new” entrants and should carefully review the alternative services for which the spectrum would facilitate an immediate benefit to the public.

¹¹ 47 U.S.C. §316

¹² 47 U.S.C. §316 (a)(1)

¹³ *FCC Strategic Plan 2003 –2008*, (October 1, 2002) available at:
<http://www.fcc.gov/omd/strategicplan/strategicplan2003-2008.pdf>

The Returned Spectrum should be made available to others services. The public interest would be best served by making the spectrum available to the Broadcast Auxiliary Service.

Rather than continuing to assist ICO and TMI in stockpiling additional spectrum for which they have no current ability to use and which will remain fallow, the Commission must review all of the assignment alternatives through a formal Notice and Rulemaking and determine that service or services which would provide the highest and best use of these frequencies for the public.

The Broadcast Auxiliary Service (BAS) provides essential, critical support to the news gathering and informational broadcast functions of television licensees. In the United States the BAS spectrum is used primarily for electronic news gathering (ENG) functions as well as to produce coverage of events of interest to the public such as major sporting contests. The BAS spectrum is an integral part of virtually all television news programs and “live” event broadcasts. The BAS service provides the public an ability to be “on site” in real time. It is this spectrum that allows broadcasters to take events as they occur and provide coverage of those events to the public in a timely manner. Coverage is “real time” as it occurs – when it is important and of interest to the public.

In the event of an emergency, it is the BAS operation of local television licensees that provides on site, on time coverage of the event. This information, and the ability to broadcast it from a position of access to the event itself, constitutes the true and real value of television. It is a value, a benefit, which often remains unrecognized when seen against the entertainment uses of the medium. But when an emergency occurs, where there are events that the public must be aware of – it is the BAS operation that allows the viewer to see and hear what is actually occurring, as it occurs. This ability to provide the public with on site, on time coverage (and coverage from different points of view) is fundamental to our modern society.

Ten years ago (1995) the Commission began its investigation into the possibility of clearing the 2 GHz spectrum for the Mobile Satellite Service. It ultimately concluded that BAS facilities would be transitioned to operate in a modified (spectrum reduced)

band. MSS and 3G systems were given what had been Channels 1 and 2 under the prior BAS plan. BAS operations were required to shrink their channel bandwidth from 17 MHz to 12 MHz.¹⁴

What is readily apparent is that broadcasters have been losing BAS spectrum over the past few years at a rate that is matched only by the growth of the users of wireless technology itself.¹⁵ Not only are there more entrants into the wireless field clamoring for additional spectrum but also there are also fewer protected channels for utilization by extraordinarily important BAS operations. These operations provide a substantive public benefit that is essential in our modern democratic society and must therefore be supported and protected by the Commission.

CONCLUSION

The Commission should not continue to assign (or reassign) valuable 2 GHz spectrum to entities who have not been able to meet their developmental projections, nor to a service whose promise remains almost wholly one of conjecture. The Commission must conduct a Rulemaking in order to determine the best and highest use for the spectrum made available by the three (3) relinquishing MSS licensees. Total RF urges the Commission to carefully consider the current, immediate and patently clear public benefits provided by BAS Services to the public and grant to the BAS Service all or some portion of the returned spectrum.

Respectfully Submitted,
TOTAL RF MARKETING, INC.

A handwritten signature in black ink, appearing to read 'Fred Fellmeth', written over a horizontal line.

Fred Fellmeth
General Counsel

¹⁴ *Mobile Satellite Service*, ET Docket 95-18

¹⁵ See: *Comments of the Society of Broadcast Engineers to the Spectrum Policy Task Force*, ET Docket 02-135, July 8, 2002, The Comment provides a "Summary of Rulemakings" impacting BAS frequencies showing no less than 22 matters that impacted the spectrum available to the BAS service.